No. 15,396

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

HALTON TRACTOR COMPANY, INC., a corporation and WES DURSTON, INC., a corporation,
Appellees.

On Appeal from the Judgments of the United States District Court for the Northern District of California.

PETITION BY THE APPELLANT FOR REHEARING, OR ALTERNATIVELY, FOR MODIFICATION OF OPINION.

CHARLES K. RICE,
Assistant Attorney General.
LEE A. JACKSON,
A. F. PRESCOTT,
HELEN A. BUCKLEY,
Attorneys, Department of Justice,
Washington 25, D. C.
ROBERT H. SCHNACKE,
United States Attorney.
MARVIN D. MORGENSTEIN,
Assistant United States Attorney.

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To the Honorable Circuit Judges Stephens, Pope and Hamley of the United States Court of Appeals for the Ninth Circuit:

Comes now the United States of America, appellant herein, by its attorneys of record, and respectfully petitions that this Court grant a rehearing of the above-entitled case, or alternatively, that this Court modify its opinion and decision filed on July 23, 1958.

In support thereof the United States of America respectfully states as follows:

I. The United States does not here question the holding of this Court that the appellees had a right to maintain their actions and that the taxes were not paid with a donative intent. However, the United States does respectfully request that this Court consider further the question of whether Halton Tractor Company has already received sufficient proceeds from the sale of equipment to compensate it for the taxes paid and that certain language in the opinion be modified with respect to the various items to be considered as to this question.

The position of the United States is that Halton has already recovered the taxes which it paid to the Government on Watson's behalf, and as such has not borne the financial burden of the tax and is without standing to sue for its recovery. This question is completely independent of the matter of priority of liens, and it is resolved by an arithmetical determination of whether the amount that Halton paid out was exceeded by the amount that it received from the sales of equipment. As of the end of January, 1948, Watson's obligations to Halton were as follows (the pertinent figures are set forth in the Court's slip opinion, p. 12):

Conditional sales contract (4-19-47)	$14,594.06
Interest due on above	351.78
New chattel mortgage (10-2-47)	23,000.00
Interest due on above	562.27
	$38,508.11

To the figure of $38,508.11 must be added the cost of repairs made by Halton in order to put the equipment into a saleable condition. For all of the equipment sold, Halton spent a total of $6,517.37 on repairs. (Ex. 10.) Halton was thus clearly out-of-pocket the sum of $45,025.48, which we might term for our purposes here the cost of the equipment sold by him.

Next to be considered then is the amount received from the sale of the equipment, the sum of $57,807.97. When the cost of the equipment ($45,025.48) is subtracted from the selling price, there remains $12,-782.49, a figure which may be designated as the gross profit. From the $12,782.49, however, Halton claims that it is entitled to deduct other items of expense. It is to two of these items, one designated "Sales Department Operating Expenses" and the other entitled "Interest Accruing under Conditional Sales Agreement and Mortgage" to which we now turn. In the opinion herein, this Court stated as follows (Slip Op. 12-13):

> In computing what it received as a result of these sales, Halton charges an item of $7,931.25, consisting of "Sales Department Operating Expenses", that is to say, what it called a proportion of the expense of its organization, including salesmen, incurred in making the retail sales of the machinery and equipment here involved. This Halton contends was a normal cost of accomplishing sales of equipment at retail. It also charged to the transaction interest on the amounts owing on the mortgage and conditional sales contract from January 31, 1948 to the date that the equipment was sold, amounting to $1,935.27. * * *

> The trial court filed an opinion prior to the making of its formal findings in which it expressed the view that these several items of expense incurred by Halton were properly charged by him. We think that in this the trial judge was correct; the charge for interest would appear to be proper under the principles which underlie *Jefferson Standard Life Ins. Co. v. United States,* 9 Cir., 247 F. 2d 777. Cf. *United States v. Lord,* 155 F. Supp. 105.

It is submitted that the record clearly discloses that neither of these expenses has been properly computed and, assuming that some such expense may be taken into consideration, the correct amounts must be determined by the court below on remand.

The first item, sales department operating expense, $7,931.25, was arrived at "by allocating to the sale of Watson's equipment a portion of the annual cost of running Halton's used equipment sales department * * *." (R. 52.) The office manager for Halton testified that the operating expenses for 1948, direct and indirect, allocated to the sales department, were 13.72 percent of the total sales. Thus, the item of $7,931.25 was arrived at by taking 13.72 percent of the total selling price of Watson's equipment, $57,-807.97. (R. 248.) The $57,807.97 figure includes the selling price of the 1946 Ford pickup truck ($1,000) and that of the 1942 Chevrolet coupe ($1,200) and it is apparent that some selling expense has been allocated to these two items. (Ex. 10; R. 248-249.) Such an allocation is incorrect as the record discloses that

Halton did not incur any expense whatsoever in connection with the Ford and Chevrolet sold, neither of which was sold by Halton.[1] The $7,931.25 selling expense figure has thus been overstated.

The remaining item in dispute is the so-called "Interest Accruing under Conditional Sales Agreement and Mortgage" in the amount of $1,935.27. (Ex. 10.) In its opinion this Court stated that this figure represented "interest on the amounts owing on the mortgage and conditional sales contract from January 31, 1948 to the date that the equipment was sold." (Slip Op. 12.) Such is not exactly the case, however. The method by which this so-called interest was computed is highly irregular and should be further considered by the trial court on remand. As to the items covered by the conditional sales contract[2] (Ex. 1), there was a principal balance due on January 31, 1948, of $14,-594.06. Apparently, interest at the rate of 9 percent was charged on this balance due from February 1, 1948, to December 30, 1948, the date of sale. (R. 253-256, 258.) The conditional sales contract provides for interest on deferred payments at the rate of 7 percent per annum to maturity and 9 percent after maturity.

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[1]The situation regarding these vehicles may be quickly summarized: The Ford and Chevrolet were not in Halton's yard at the time of the seizure of the rest of the equipment, but had been delivered to the McAuley Motor Company for sale. They were never seized by the Government. McAuley sold the vehicles and gave Halton a check for $2,200. (R. 107-108, 137, 187.) This was the net amount received by Halton from the sale of these vehicles and it obviously had no selling expenses in connection with them since it had nothing to do with the sale.

[2]DW-10 tractor No. IN2792, DW-10 tractor No. IN2791, CW-10 scraper No. 566, CW-10 scraper No. 568.

(Ex. 10.) However, the propriety of using an interest rate as high as 9 percent in order to determine the extent to which Halton has recouped the taxes paid should be considered by the court below. There appears no reason why the high rate set by the conditional sales contract as a penalty for delinquent payments should be used for a computation such as that presently before the Court.

Even more unusual, however, was the method used for computing interest on the balance of the equipment, that covered by the new chattel mortgage. (Ex. A.) First of all, although not entirely clear from the record, the interest rate used was apparently 2 percent per month on the first $300, and one-half percent per month on the balance. (R. 259.) This rate was admittedly not derived from the promissory note supporting the new chattel mortgage. (R. 260.) Aside from the matter of the rate to be applied, however, the method by which the interest was computed was not only complicated, but downright peculiar. The starting point is the $23,000 principal amount owing on the new chattel mortgage as of January 31, 1948. (R. 261.) On February 6, the Ford and Chevrolet were sold for $2,200 and on March 9 two tractors were sold for $21,000. Thus, by the beginning of March the entire principal amount under the new chattel mortgage had been recovered. However, Halton continued to compute interest for the remainder of the year. There is set forth in the footnote below a table showing the amounts by which Halton reduced the outstanding principal after each sale for purposes of

interest computations.[3] It should be noted that the principal reduction bears no relationship to the sales prices received. It is obvious that Halton has attempted to figure interest on more than the outstanding amounts due on the mortgage. Such charges are not proper for purposes of determining whether or not Halton has recouped the taxes it paid for Watson.

In summary, Halton sold for $57,807.97 property which cost him $45,025.48. He received a gross profit of $12,782.49 from the sales. Selling expenses and interest charges, properly computed, are to be deducted from this gross profit to derive the net profit. The correct amount of these items should be determined by the court below on remand. The court below in reconsidering these figures should determine whether or not the net profit was greater than the taxes paid, $5,877.97. If so, Halton has not suffered any loss and is entitled to no recovery. Additionally, if the net profit is less than the taxes paid, Halton

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[3]Table of items covered by new chattel mortgage, showing sales price, outstanding principal on mortgage, and amount by which Halton reduced principal for purposes of interest computation (R. 261-270; Ex. 10):

Date	Item Sold	Sales Price	Outstanding Principal	Principal Reduction
1-31-48			$23,000.00	
2- 6-48	Ford and Chevrolet	$ 2,200.00	23,000.00	–0–
3- 9-48	2 DW 10 Tractors	21,000.00	8,000.00	$15,000.00
4- 6-48	Rooter	1,000.00	7,583.33	416.67
5-26-48	CW 10 Scraper	2,250.00	5,916.66	1,666.67
6- 9-48	Fuel Tank Wagon	250.00	5,916.66	–0–
6-23-48	Fuel Tank Wagon	250.00	5,916.66	–0–
7-17-48	Fuel Tank Wagon	250.00	5,916.66	–0–
8-23-48	DW 10 Tractor	4,500.00	4,040.57	1,876.09
12-30-48	Fuel Tank Wagon	74.10		
	and DW 10 Tractor	5,131.02	–0–	4,040.57

may recover no more than the difference. At this point, it must be noted that the question of whether or not Halton has suffered a loss from the tax payment is completely apart and aside from the question of priority of liens, and goes only to show the maximum amount which may be recovered assuming that the Government had no lien priority whatsoever.

II. This Court held that as to six items, the Government's lien had priority. These items were sold for a total of $3,024.10. (Slip Op. 13.) The Court then went on to state that the lower court on remand should determine whether this full sum was to be credited against the taxes paid by Halton, or whether it should be reduced by repair expense and sales expense. As noted in part I to this petition, $2,200 of this amount was received from a sale by McAuley Motors, and as to this amount Halton could not have incurred any sales expense. (R. 107-108, 137, 187.) Additionally, the Government questions the propriety of any such deductions whatsoever, as to these six items where the Government had priority of liens.[4] There is nothing in the record to show that the Government might not have sold these items for more than $3,024.10 had not Halton stepped in and paid the taxes. Also, it would appear that this sum of $3,024.10 should be credited, not against the $5,877.97 paid, but rather against the unrecouped amount of taxes computed as set forth in part I above. When so offset it is apparent that the repair and selling

[4]It should be noted that the Ford and Chevrolet were never seized. (R. 137.)

expenses of Halton have already been allowed, and no such deduction should be made.

For the reasons above stated, the United States of America petitions that the Court grant a rehearing, or in the alternative that the opinion filed on July 23, 1958, be modified.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

ROBERT H. SCHNACKE,
United States Attorney.

August, 1958.

CERTIFICATE OF COUNSEL.

I, Charles K. Rice, Assistant Attorney General, do hereby certify that this petition is presented in good faith and not for delay.

CHARLES K. RICE,
Assistant Attorney General.

I, Robert H. Schnacke, United States Attorney, do hereby certify that this petition is presented in good faith and not for delay.

ROBERT H. SCHNACKE,
United States Attorney.